U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

August 31, 2016

BY ECF (REDACTED) AND FACSIMILE

The Honorable P. Kevin Castel
United States District Judge
Daniel Patrick Moynihan Federal Courthouse
500 Pearl Street
New York, NY 10007-1312

Re: United States v. Gary Hirst, 15 Cr. 643 (PKC)

Dear Judge Castel:

The Government respectfully submits this opposition to defendant Gary Hirst's motions *in limine* seeking to preclude large swaths of the Government's proposed trial evidence. Hirst's motions misread the Indictment in this matter, ignore fundamental principles of conspiracy law and seek to constrain the Government from proving conduct properly alleged in Counts of the Indictment in which Hirst is named as a defendant. Hirst argues that the Government is somehow constrained to only offering evidence as to conduct in which Hirst participated or had direct knowledge. Put simply, that is not the law. Basic precepts of conspiracy law provide that Hirst is liable for the reasonably foreseeable actions of his co-conspirators, and the Government can properly introduce evidence as to such actions. Limiting the Government's proof in the manner proposed by Hirst will leave the jury with an incomplete, and ultimately misleading, picture of the scope of criminal conduct engaged in by Hirst and the members of the conspiracy of which the Government alleges that Hirst was a part. For this straightforward reason, and for the more detailed reasons set forth below, Hirst's motions *in limine* should be denied.

FACTUAL BACKGROUND

Despite Hirst's efforts to portray it otherwise, Counts One through Four of the Superseding Indictment (the "Indictment") charge Hirst, and the co-conspirators named in those counts, with participation in a *single*, unified scheme to defraud. That scheme involved the issuance of more than $70 million of shares of Gerova Financial Group Ltd. ("Gerova") to a foreign nominee, Ymer Shahini, premised on representations that Shahini would not sell those shares in the United States (Indictment ¶¶ 20-23, 26-29); the creation of false documents to fraudulently support the issuance of those shares (Indictment ¶¶ 24-25, 30); the hiding of the issuance of those shares from Gerova's CFO and outside counsel, and other outside parties, including the New York Stock Exchange (Indictment ¶¶ 31-34); the depositing of those shares in U.S. brokerage accounts, from which the shares were sold in the United States market at the direction of members of the conspiracy (Indictment ¶¶ 36-42); the use of matched trading with corrupt investment advisers – including the principals of Martin Kelly Capital and James Tagliaferri – in order to stabilize the price of Gerova while Shahini's shares were being dumped in the market (Indictment ¶¶ 43-58); and the receipt of the proceeds of those sales by Hirst and other members of the conspiracy (Indictment ¶¶ 59-62).

Hirst, the President and Chairman of Gerova at the time of the conduct alleged in the Indictment, is alleged to have taken multiple actions in furtherance of the scheme. First, Hirst transmitted a letter to Gerova's transfer agent, directing the issuance of the shares to Shahini. (Indictment ¶ 27). Hirst is also alleged to have executed a warrant agreement that purported to grant Shahini warrants in exchange for a putative obligation owed to Shahini as a result of consulting services provided to Gerova. (Indictment ¶ 25). The Government alleges that this warrant agreement is fraudulent on its face, first because the date of the agreement was more than two months before Shahini was recruited to be part of the scheme and, second, because Shahini did not perform the consulting services that purportedly gave rise to the obligation that was satisfied, according to the warrant agreement, by the issuance of warrants to Shahini. (Indictment ¶¶ 23-25). The Indictment further alleges that Hirst did not contemporaneously ask the Board of Directors of Gerova to approve the issuance of the shares to Shahini, as required by Gerova's bylaws, nor did he disclose the existence of such shares to Gerova's CFO until the CFO independently discovered the existence of such shares. (Indictment ¶¶ 31, 33-34). Further, an April 2010 letter to the New York Stock Exchange ("NYSE") that was signed by Hirst and which purported to inform the NYSE of all consulting agreements entered into by Gerova failed to include the purported consulting agreement with Shahini, which was dated January 22, 2010. Although the Indictment does not allege that Hirst directed any of the trading of the Shahini shares from U.S. brokerage accounts, the Indictment does allege that at least $2.6 million of the proceeds of margin loans obtained in connection with the Shahini shares were transferred to a bank account of an entity controlled by Hirst. (Indictment ¶60c).

Count Five of the Indictment alleges that Jared Galanis, along with others not named as defendants therein, provided compensation to an investment adviser, James Tagliaferri, which Tagliaferri did not disclose to his clients and that Jared Galanis thereby aided and abetted Tagliaferri's investment adviser fraud. (Indictment ¶¶ 73-77). Counts Six and Seven of the Indictment charged that Jared Galanis, along with others not named as defendants therein, conspired to commit securities fraud, and did commit securities fraud, in connection with a scheme to use funds of certain clients of Tagliaferri to make investments that would generate proceeds to pay off obligations owed to other Tagliaferri clients. (Indictment ¶¶ 78-88). The conduct alleged in Counts Six and Seven of the Indictment is alleged to have ended in or about April 2010. (Indictment ¶¶ 84, 88). Because Hirst is not charged in Counts Five through Seven of the Indictment, the Government does not intend to prove Counts Five through Seven at trial.

DISCUSSION

I. HIRST IS LIABLE FOR THE ACTS OF HIS CO-CONSPIRATORS AND THE GOVERNMENT CAN PROPERLY INTRODUCE EVIDENCE AS TO THE ENTIRETY OF THE CHARGED SCHEME

Hirst is charged with participating in a single fraudulent scheme and is liable for the reasonably foreseeable acts of his co-conspirators in carrying out that scheme, even if Hirst did not himself participate in or have direct knowledge of those acts. Hirst nonetheless argues that the Government should not be allowed to introduce evidence regarding parts of the scheme in which he is not alleged to have personally participated. (Hirst Brief ("Br.") at 1 (seeking to preclude, pursuant to Fed. R. Evid. 401 and 403, "evidence of any wrongdoing about which the government does not allege that Mr. Hirst has knowledge.")). This argument, quite simply, is contrary to basic and well-established principles of co-conspirator liability. It is an axiomatic, well-settled principle of conspiracy law that conspirators are liable for the reasonably foreseeable actions of their co-conspirators taken in furtherance of the conspiracy. *Smith* v. *United States*, 133 S. Ct. 714, 719 (2013) ("Since conspiracy is a continuing offense, a defendant who has joined a conspiracy continues to violate the law 'through every moment of [the conspiracy's] existence,' and he becomes responsible for the acts of his co-conspirators in pursuit of their common plot.") (internal citations omitted); *United States* v. *Mittelstaedt*, 31 F.3d 1208, 1219 (2d Cir. 1994) ("A defendant charged in a single conspiracy is ordinarily held accountable for all unlawful acts of the conspiracy that are reasonably foreseeable, even without direct knowledge of them.") (citing *Pinkerton* v. *United States*, 328 U.S. 640, 647-47 (1946)); *United States* v. *Romero*, 897 F.2d 47, 50 (2d Cir. 1990) ("A conspirator need not be proven to have known of all the details of the broader conspiracy; there need only be some evidence from which it can reasonably be inferred that the person charged knew of the existence of the scheme and knowingly joined and participated in it.") (internal quotation marks and ellipses omitted).

Juries in this district are routinely instructed on this basic principle of conspiracy law. *See* Sand et al., *Modern Federal Jury Instructions*, Instr. 19-9 ("Accordingly, the reasonably foreseeable acts, declarations, statements and omissions of any member of the conspiracy and in furtherance of the common purpose of the conspiracy, are deemed, under the law, to be the acts of all of the members, and all of the members are responsible for such acts, declarations, statements and omissions. If you find, beyond a reasonable doubt, that the defendant whose guilt you are considering was a member of the conspiracy charged in the indictment, then, any acts done or statements made in furtherance of the conspiracy by persons also found by you to have been members of that conspiracy, may be considered against that defendant. This is so even if such acts were done and statements were made in the defendant's absence and without his knowledge.").

Under these well-settled principles of law, the acts of Hirst's co-conspirators may be considered as evidence against him and the Government should not be precluded from offering such evidence. The actions taken to dispose of the Shahini shares, whose issuance Hirst caused by transmission of a letter to Gerova's transfer agent, are properly considered against Hirst. This includes evidence of the depositing of the shares in multiple brokerage accounts, the efforts to sell the shares from the brokerage accounts, the impact such sales had on the share price of Gerova, and the subsequent resort to matched trading with corrupt investment advisers in order to stabilize the price of Gerova shares. Such evidence is directly relevant to Hirst because the Indictment alleges that an entity associated with Hirst received proceeds from the sales of Shahini's shares. The import of Hirst's instant motion, if granted, would be to allow the Government to introduce evidence as to Hirst's involvement in the issuance of the Shahini shares and his ultimate receipt of proceeds from the sale of such shares, without allowing the Government to introduce any evidence as to *how* such proceeds were generated and the impact such sales had on the market price of Gerova. Such a ruling would constrain the Government from presenting to the jury the full narrative of the charged scheme and would shield the jury from significant fraudulent conduct undertaken by Hirst's co-conspirators as part of the joint scheme.

In response to this straightforward application of basic principles of conspiracy law, Hirst goes so far as to attempt to re-categorize the single, unified scheme charged in Counts One through Four of the Indictment as multiple schemes and to disclaim Hirst's association with all but one of these re-categorized schemes. (Br. 2-3 (referencing the "foreign nominee fraud," the "pump-and-dump scheme" and the "investment adviser fraud.")).[1] This re-categorization is contrary to the plain structure of the Indictment. The straightforward goal of the conspiracies and schemes charged in Counts One through Four of the Indictment was for the conspirators to profit from the issuance and sale of the Shahini shares, and the conduct alleged in paragraphs 1 through 62 was the means through which that goal was accomplished. A "foreign nominee fraud," standing alone, is non-sensical. There can be no conceivable, plausible purpose for conspiring with others to fraudulently *issue* shares to a foreign nominee unless there is a corresponding plan to *dispose* of those shares. The issuance and disposal of the foreign nominee shares are necessarily part of the same scheme and, indeed, that is exactly what the Indictment alleges. The "foreign nominee fraud" and "pump-and-dump scheme," as Hirst classifies them, are part and parcel of the same charged fraud, and the Government should be allowed to introduce evidence as to all aspects of the charged scheme.

Hirst seeks to preclude the Government from offering *any* evidence as to the "pump-and-dump" scheme. (Br. 5-7). As noted above, the so-called "pump-and-dump" scheme is the method by which the members of the conspiracy disposed of the Shahini shares and evidence regarding the disposal of the Shahini shares is critical to explaining the full operations of the charged conspiracy.[2] As such, the Government should not be precluded from calling witnesses

[1] Hirst, of course, did not seek to dismiss the Indictment on the ground that it charged multiple conspiracies in a single count.

[2] Hirst argues that because the last overt act in the Indictment attributable to him was his receipt of approximately $2.6 million on June 22, 2010, "Mr. Hirst's role in the conspiracy ended prior to the pump-and-dump scheme," and, as a result, evidence of what Hirst characterizes as the "pump-and-dump" scheme should be precluded. (Br. 6). Of course, Hirst's position ignores another well-established principle of conspiracy law, namely that a conspirator's membership in the conspiracy continues until the conspirator withdraws. *Smith* v. *United States*, 133 S. Ct. 714, 717 (2013) ("Upon joining a criminal conspiracy, a defendant's membership in the ongoing unlawful scheme continues until he withdraws."). It is ultimately of no moment that certain parts

such as Gavin Hamels – one of the investment advisers who participated in "matched trading" of Gerova shares with members of the conspiracy – or representatives of the various brokerage firms in which Shahini's shares were deposited. Additionally, the Government should not be precluded from offering summary exhibits that summarize the matched trading conduct alleged in the Indictment.[3]

The Government is of course mindful that Hirst, and not his co-conspirators, are on trial in this matter. The Government has taken every effort to streamline its presentation of evidence regarding conduct of Hirst's co-conspirators in furtherance of the scheme, but governing law allows the Government to present evidence regarding the operations of the conspiracy as a whole, and such evidence is necessary for the jury to have a complete understanding of the fraudulent actions of the conspiracy as a whole.

Hirst also mischaracterizes the Government's intent with respect to what Hirst classifies as the "investment adviser fraud." To be clear, the Government does not intend to introduce evidence relating to Counts Five through Seven of the Indictment, as Hirst is not charged in those counts. However, there *is* conduct by corrupt investment advisers that the Government alleges forms part of the fraudulent scheme in which Hirst is charged and the Government does intend to introduce evidence of such conduct. Specifically, paragraphs 42 through 58 of the Indictment allege that, when the initial sales of Shahini's shares caused a significant decrease in the price of Gerova stock, members of the conspiracy began "matched trading" of Gerova stock with corrupt investment advisers – namely, these corrupt investment advisers purchased shares of Gerova at the direction of members of the conspiracy at the same time that members of the conspiracy were directing sales of Shahini's shares. James Tagliaferri is alleged to have been one of the corrupt investment advisers with whom members of the conspiracy participated in matched trading. (Indictment ¶¶ 54-59). While the Government does not intend to introduce evidence about conduct with Tagliaferri that is reflected in Counts Five through Seven of the Indictment, it does intend to introduce evidence about Tagliaferri's matched trading conduct alleged in paragraphs 54 through 59 of the Indictment, as such conduct is part of the fraudulent scheme in which Hirst is alleged to have participated.

Further, Tagliaferri's involvement in the matched trading conduct shows why the testimony of Alan Cole and Kathy Kram is relevant. Both witnesses had parents who were

---

of the charged scheme took place after the last overt act attributed to Hirst. Because Hirst has offered no evidence of his withdrawal from the charged conspiracy, evidence of the conduct of Hirst's co-conspirators that post-dates the last overt act attributed to Hirst is properly admissible against Hirst.

[3] In several places in his motion, Hirst notes the volume of the Government's proposed exhibits. *See, e.g.*, Br. 4 ("thousands of pages of exhibits relate solely to the pump and dump and investment adviser schemes."). Although the voluminous records of the trading activity in Shahini's shares and in Gerova shares more generally are relevant to the charged offenses, the Government does not of course intend to do a page-by-page analysis of these exhibits before the jury, but instead intends to introduce such evidence largely through summary exhibits admissible pursuant to Fed. R. Evid. 1006.

investment advisory clients of Tagliaferri during the relevant time period (Kram's mother has since passed away; Cole's mother is in her nineties and quite frail). The Gerova shareholdings of both Tagliaferri clients increased substantially during the period in which Tagliaferri is alleged to have participated in matched trading with members of the conspiracy, and both lost substantial sums of money when Gerova collapsed shortly after Tagliaferri purchased these substantial quantities of Gerova in their accounts. These witnesses are not victims of some separate "investment adviser fraud" that is not the subject of this trial; rather, they are victims of the very scheme in which Hirst is alleged to have participated. The Government is certainly allowed to show to the jury that real victims suffered substantial monetary losses as a result of Hirst's participation in the fraudulent scheme charged in the Indictment.

Because the Government does intend to introduce evidence regarding the matched trading conduct of corrupt investment advisers that is alleged in paragraphs 42 through 58 of the Indictment, the proposed testimony of Arthur Laby regarding the statutory and other fiduciary duties of investment advisers is also relevant and should not be precluded.

In short, contrary to the characterization by Hirst that testimony regarding the disposal of Shahini's shares and the efforts of Hirst's co-conspirators to stabilize the price of Gerova stock is as to "collateral matters" (Br. 7), such conduct is in fact a significant component of what is properly charged in the Indictment as a single scheme to defraud. The reasonably foreseeable acts of Hirst's co-conspirators are properly attributable to him and the Government should not be precluded from offering evidence as to all aspects of the charged scheme, even those in which Hirst is not alleged to have directly participated or about which he did not have prior knowledge.

[redacted]

At trial, the Government intends to introduce evidence that Hirst and others hid the existence of the 5,333,333 Gerova shares issued to Shahini from Gerova's CFO and outside counsel, among others. The Government expects to introduce evidence that Gerova's CFO learned of the existence of these shares after reviewing a shareholder list that he obtained from Gerova's transfer agent in September 2010, some four months after the Shahini shares were actually issued. The Government also expects to introduce evidence that, on or about July 23, 2010, Shant Chalian, a partner with a law firm that served as Gerova's outside corporate counsel, sent an email to various officers of Gerova, including Hirst, noting that Chalian was about to distribute a draft registration statement, which was intended to register various shares issued by

Gerova that were otherwise restricted. Five days after this email from Chalian, and during the time period when Gerova's CFO and outside counsel were still unaware of the existence of the Shahini shares, [redacted]

[redacted] In any event, as the Second Circuit has noted, "[T]he threshold for relevance is low." *See United States* v. *Monk*, 577 F. App'x 8, 9 (2d Cir. 2014) (summary order) (citing *United States* v. *Pugliese*, 153 F.2d 497, 500 (2d Cir. 1945) ("All that is necessary, and all that is possible, is that each bit [of evidence] may have enough rational connection with the issue to be considered a factor contributing to an answer.")). That minimal standard is clearly met here. Further, the probative value [redacted], which is high, is not substantially outweighed by the danger of unfair prejudice, thus requiring preclusion of the [redacted] pursuant to Fed. R. Evid. 403. There is nothing unfairly prejudicial about the jury [redacted] regarding the core matter at issue at the trial.

[redacted]

[redacted]

III. THE GOVERNMENT INTENDS TO ABIDE BY THE RULES OF EVIDENCE

Hirst sets forth a number of statements in the Government's 3500 material that he contends are inadmissible. (Br. 9-10). As a general matter, the Government is aware of the Rules of Evidence and does not intend to elicit testimony that is speculative, lacks foundation, calls for improper expert testimony or is otherwise inadmissible. If the Government does seek to elicit testimony that Hirst believes is inadmissible, he can object to such testimony during the trial and the Court can render a ruling. No pretrial admonition that the Government is bound by the Rules of Evidence is required.

Nonetheless, the Government believes certain of the lines of testimony to which Hirst is lodging a pretrial objection appear to be quite proper. Members of the board of directors of Gerova can, for example, properly offer testimony that they understood that Gerova's bylaws and other governing documents required certain corporate actions, such as the issuance of new stock or warrants, to be approved by the board. Such testimony does not require these directors to offer opinion testimony regarding the requirements of Cayman law, but instead to offer their understanding of their roles as directors and the requirements of Gerova's governing documents.

Similarly, the Government does not intend to elicit propensity evidence from Shant Chalian or to ask him about matters as to which he lacks personal knowledge. (Br. 10-11). Chalian, who essentially functioned as the "service partner" at Gerova's outside corporate counsel, has direct personal knowledge about several matters relevant to the trial and the Government intends only to elicit information that is properly admissible under the Rules of Evidence. Again, no pretrial admonition to abide by the Rules of Evidence is required.

IV. THE TESTIMONY OF NAZAN AKDENIZ IS ADMISSIBLE

Nazan Akdeniz is a supervisory compliance official at Roth Capital, an investment banking firm that also offers brokerage services. At various times, Roth Capital provided various investment banking services to the special purpose acquisition company ("SPAC") that ultimately became Gerova, and in fact had received compensation for certain of these services in the form of Gerova shares. After the issuance of the Gerova shares to Shahini in late May 2010, members of the conspiracy sought to deposit all 5,333,333 of Shahini's Gerova shares in a brokerage account at Roth Capital. Although steps were taken to open such an account, Roth Capital ultimately rejected the Shahini shares because, among other reasons, the documentation submitted in connection with the proposed account opening differed from what Roth Capital typically received in connection with corporate insider share issuances. The Government intends to elicit from Akdeniz information about the opening of the account and the factual reasons why Roth Capital ultimately rejected the Shahini shares. The Government does not intend to elicit impermissible opinion testimony from Akdeniz.

Akdeniz's testimony is probative for several reasons. First, it will assist the jury in understanding what happened to the Shahini shares after they were issued. Akdeniz's testimony advances the narrative regarding the immediate efforts of the co-conspirators to deposit and monetize the Shahini shares, despite the representations in the opinion letter sent by Hirst to Gerova's transfer agent that such shares would not be sold to U.S. persons. Second, it is of course probative of the knowledge and intent of the co-conspirators that the very first brokerage firm at which members of the conspiracy sought to deposit the shares – indeed, one that had a preexisting relationship with Gerova and which was a Gerova shareholder itself – rejected the shares because of concerns about the documentation associated with those shares.

For the reasons set forth in Point I above, it is of no moment that Gary Hirst did not participate in the efforts to deposit the Shahini shares in the various brokerage accounts, including at Roth Capital. If Hirst is found by the jury to be a member of the conspiracy, Hirst is liable for the acts of his co-conspirators, including their efforts to deposit Shahini's shares at Roth and other brokerage firms, and the jury may properly hear evidence of these acts. *Cf.* Sand et al., *Modern Federal Jury Instructions*, Instr. 19-6 ("The extent of a defendant's participation has no bearing on the issue of a defendant's guilt. A conspirator's liability is not measured by the extent or duration of his participation. Indeed, each member may perform separate and distinct acts and may perform them at different times. Some conspirators play major roles, while others play minor parts in the scheme. An equal role is not what the law requires. In fact, even a single act may be sufficient to draw the defendant within the ambit of the conspiracy."). Akdeniz's testimony is admissible against Hirst and should not be precluded.

V. THE JANUARY 28, 2011 NYSE LETTER IS ADMISSIBLE

Hirst argues that the Government should be precluded from offering a January 28, 2011 letter on Gerova letterhead to the NYSE that was submitted over the signature of Gary Hirst (the "NYSE Letter"). (Br. 12). The NYSE Letter contains a facial misrepresentation in that it states that Gerova issued warrants to Jason Galanis for introducing a certain fund to Gerova, rather than that said warrants were issued to Ymer Shahini, as is stated on the face of the warrant agreement purportedly entered into by Ymer Shahini and Gerova. Hirst argues that the Government lacks a proper foundation to admit the NYSE Letter. (Br. 12). Hirst is wrong. The Government can establish the authenticity and relevance of the letter and that it seeks to introduce the letter for a non-hearsay purpose. The Government thus meets all of the prerequisites for admissibility. Hirst's arguments that other evidence suggests the letter should not be attributed to him go the weight the jury should assign the letter, not its admissibility.

A witness from the NYSE will testify that the letter the Government seeks to introduce is a true and accurate copy of a record maintained in the NYSE's files. This is sufficient to establish the NYSE Letter's authenticity. *See United States* v. *Gagliardi*, 506 F.3d 140, 151 (2d Cir. 2007) ("The bar for authentication of evidence is not particularly high. . . .The proponent need not rule out all possibilities inconsistent with authenticity, or to prove beyond any doubt that the evidence is what it purports to be.") (internal citations and quotations marks omitted). As Hirst acknowledges (Br. 12), the Government will not seek to offer the NYSE Letter for the truth of any matters asserted therein. In fact, the Government will offer the evidence to establish the *falsity* of the matters asserted therein, which is a non-hearsay purpose. *See United States* v. *Pedroza*, 750 F.2d 187, 203 (2d Cir. 1984) ("The testimony was not hearsay since it plainly was not offered to prove the truth of the matter asserted. Fed.R.Evid. 801(c). Rather, the statement was offered for its patent falsity."). Finally, because the letter was submitted over Gary Hirst's signature and contained representations about the very transactions at issue in this trial, the relevance of the NYSE Letter is obvious. Having met all the prerequisites for admissibility, the Government should not be precluded from offering the NYSE Letter.

Hirst does not seriously dispute that the NYSE Letter is authentic, nor does he suggest that the Government intends to offer the document for the truth of the matter asserted. Instead, he disputes his authorship of the letter and contends that others were involved in drafting it. (Br. 12-13). Such arguments go to the weight to be assigned to the NYSE Letter and not its admissibility and can appropriately be explored by Hirst through cross-examination, or through the presentation of other admissible evidence that establishes his lack of knowledge of the contents of the letter.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

VII. THE COURT SHOULD NOT PRECLUDE CERTAIN GOVERNMENT EXHIBITS

On pages 18 and 19 of his brief, Hirst argues that the Court should preclude certain Government exhibits. The Government responds below to each specific exhibit contested by Hirst:

[redacted]

- Exhibit 50 is a one-page document that Hirst signed at the time of his arrest acknowledging his receipt of Miranda warnings. The Government had previously informed Hirst that it does not intend to offer this exhibit in its case-in-chief. However, because Hirst has informed the Government that he may challenge the authenticity of his signature on certain documents the Government does intend to introduce, the Government has marked certain exhibits, including Exhibit 50, that indisputably contain Hirst's authentic signature. The Government only intends to offer Exhibit 50 if Hirst challenges the authenticity of his signature on various documents and does not object to a limiting instruction that the exhibit may only be considered as an exemplar of Hirst's authentic signature and not for any other purpose.

- Exhibits 100 through 104 are photographs of Hirst and his co-conspirators. The Government routinely offers, and courts in this district readily admit, such photographic evidence at trial in order to establish witness familiarity with conspirators who are not on trial, as well as the defendant.

- The Government will not offer at trial Exhibits 150-152, which are photographs of certain victims of the charged scheme.

- Exhibits 390-393 are brokerage statements associated with the Cole and Kram accounts. For the reasons set forth in Point I above, Cole and Kram are victims of the scheme charged in the Indictment and not some unrelated investment adviser fraud. As a result, the brokerage statements of these individuals, which show their changing shareholdings of Gerova over time, are relevant at trial.

- Exhibits 403 and 409 are bank account statements for Barry Feiner. As noted in Point I above, the so-called "pump-and-dump scheme" is part of the charged conspiracy. Proceeds of the sales of the Shahini shares were at times wired to Feiner's bank accounts before being wired again to their ultimate destination. Summary exhibits that will trace the flow of proceeds from the sale of the Shahini shares are based, in part, on Exhibits 403 through 409, which reflect wire transfers into and out of the Feiner accounts.

- Exhibits 680 and 681 are documents directly related to the Gerova matched trading scheme in which the principals of Martin Kelly participated, as alleged in paragraphs 42 through 53 of the Indictment. As alleged in those paragraphs, the principals of Martin Kelly agreed with Jason Galanis to purchase shares of Gerova in their client accounts in exchange for the receipt of free shares of two other companies controlled by Galanis. (Indictment ¶ 45). Exhibit 680 is a document created by Galanis to fraudulently paper over the *quid pro quo* arrangement entered into with the Martin Kelly principals and Exhibit 681 is the letter the Martin Kelly principals sent to their clients about the arrangement. For the reasons set forth in Point I above, the matched trading by Martin Kelly is part of the fraudulent scheme in which Gary Hirst is charged and is not part of a separate "pump-and-dump" scheme. Further these documents do not, as Hirst contends (Br. 19), only "concern[ ] non-Gerova stock," as the essence of the *quid pro quo* arrangement reached by Galanis and the Martin Kelly principals included the purchase of Gerova shares by the Martin Kelly principals in their client accounts. In addition, neither Exhibit 680 nor 681 are inadmissible hearsay. First, both documents are co-conspirator statements made in furtherance of the conspiracy. Second, neither document is being offered for its truth. Exhibit 680 contains a misrepresentation that Martin Kelly clients were purchasing the shares that had in fact been gifted to them by Galanis. Exhibit 681 is being offered for the fact that it was transmitted to Martin Kelly clients and for the fact that it omitted a material term of the *quid pro quo* arrangement reached by the Martin Kelly principals, namely, their agreement to purchase shares of Gerova in their client accounts.

- Exhibits 1025, 1029 and 1037 are emails obtained following the execution of a search warrant on an email account used by Ymer Shahini. The Government agrees that it will not offer these exhibits at trial, with the understanding that Hirst will not seek to do so either.

- Exhibits 1260 and 1262 are emails to Jim Tagliaferri regarding the investment strategy advocated by Kram's father. In his brief, Hirst objects to these emails on relevance grounds. For the reasons stated in Point I above, Kram is a victim of the scheme charged in the Indictment and not some unrelated investment adviser fraud. Emails relating to Kram's father's investment thus meet the relevance threshold. Exhibit 1261 is an email, dated October 14, 2008, regarding the origins of the Taurus Global Opportunity Fund ("TGOF"). The TGOF is the Hirst-controlled entity that initially received $2.62 million of proceeds from the sale of the Shahini shares. Exhibit 1261 is an email from Jared Galanis to an outside lawyer stating that "Jason's close associated Gary Hirst, a hedge fund manager and non practicing attorney, formed Taurus Global Opportunity Fund for Jim." Because Exhibit 1261 describes the formation of the TGOF, which received proceeds from the sale of the Shahini shares, and because Exhibit 1261 establishes a connection between Hirst and Tagliaferri, Exhibit 1261 should not be precluded on relevance grounds.

VIII. THE COURT SHOULD ORDER HIRST TO IDENTIFY HIS TRIAL EXHIBITS

In its first discovery letter to Hirst, dated October 2, 2015, the Government requested discovery from Hirst, pursuant to Fed. R. Crim. P. 16(b). The Government has received no discovery materials from Hirst. As the Court is aware, the Government produced 3500 material on August 22, 2016, three weeks before trial. The Government identified the bulk of its trial exhibits on August 24, 2016. The Government has continued to identify exhibits for Hirst on a rolling basis. The Government understands that Hirst intends to offer a defense case at trial. The Government respectfully requests that the Court order Hirst to identify any trial exhibits he intends to offer at trial by September 5, 2016, one week before trial. This will give the

Government an opportunity to file *in limine* motions in advance of trial with respect to any proposed defense exhibits that present evidentiary issues and will avoid trial by ambush.[7]

CONCLUSION

For the reasons set forth above, Hirst's motions *in limine* should be denied.

Respectfully submitted,

PREET BHARARA
United States Attorney

By: /s Brian R. Blais____
Brian R. Blais
Rebecca Mermelstein
Aimee Hector
Assistant United States Attorneys
(212) 637-2521/2360/2203

[7] The Government also has not received any prior statements of Hirst's proposed witnesses, including the four expert witnesses disclosed by Hirst, as required by Fed. R. Crim. P. 26.2(a).